No. 21207

UNITED STATES COURT OF APPEALS
For the Ninth Circuit

LARRY P. SMITH, et al., Appellants,

vs.

HILLTOP REALTY, INC., et al., Appellees,

HILLTOP REALTY, INC., et al., Cross-Appellants,

vs.

LARRY P. SMITH, et al., Cross-Appellees,

and

THE AUSTIN COMPANY,
Additional Cross-Appellee as to Count No. 4 only.

ON CROSS APPEAL FROM THE JUDGMENT OF THE
UNITED STATES DISTRICT COURT OF THE
WESTERN DISTRICT OF WASHINGTON

OPENING BRIEF OF HILLTOP REALTY, INC., et al., AS CROSS-APPELLANTS

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December 9, 1966

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INTRODUCTION

Cross-appellants incorporate by reference its introductary statement of its Answering Brief on appeal (Hilltop Ans. Br. 1-2) as to designation of names used herein.

JURISDICTIONAL STATEMENT

The District Court had jurisdiction of counts 1, 2 and 3 by diversity and amount, 28 U.S.C., §1332 (R. 1ff, 100ff, 1053); and of the Sherman Act count 4 under 15 U.S.C., §§1, 2 and 15, and 28 U.S.C., §§1331 and 1337.

This Court has jurisdiction of this Cross Appeal und 28 U.S.C., §§1291, 1292 and 2107, and F.R.Civ.P. 54(b) an by Notice filed June 13, 1966 (R. 2185) from a Final Judg tered May 16, 1966 (R. 2146, 2234) in this multiple claim party case (R. 2148).

SUMMARY OF PLEADINGS ON CROSS APPEAL

In January 1963, Hilltop alleged four causes of acti against Smith: (1) fraud, (2) breach of contract, (3) vi of Ohio State Antitrust Law, and (4) violation of the She (R. 1ff).

The antitrust causes were sustained after full brief oral argument in the Court's Memorandum Decision of May 1 attached as Appendix A. The Court over-ruled Smith's Mot Dismiss without prejudice to review after pretrial was co (R. 21-2).

In July 1964, after partial pretrial, Hilltop filed First Amended Complaint which numbered the four causes as ate counts, added additional Smith defendants, and named Austin as an additional defendant on the Sherman Act coun only (R. 100ff). Further pretrial by all parties continu the winter of 1964 (R. 2221ff).

Smith and Austin respectively filed Motions for part summary judgment and dismissal of the antitrust counts (R

41). The Court terminated further discovery by a freeze order R. 530, 532) and directed the parties to submit a "detailed con-se statement of its factual contentions as to all counts", show-ng expected method of proof and references to exhibits, deposi-ons and other discovery (R. 531-2). Hilltop complied (R. 651). ith and Austin filed contentions which disputed many facts aimed by Hilltop (R. 692, 725, 752, 783).

In 1965, after briefs and oral argument, the Court reversed s 1963 decision (R. 21-2). The antitrust portion of its Amended cision (R. 827-36 at 829-31) is attached as Appendix B. It as-med as true Hilltop's Contentions and reasonable inferences but ncluded they did not state antitrust violations. Accordingly, granted partial summary judgment and dismissal (R. 827, 948, 0). Hilltop preserved its jury demand on those counts if re-nded for trial on the merits (R. 2147-8).

The remaining counts for fraud and breach of contract were ter tried to the Court which found the Smith defendants guilty actual fraud which was "calculated, deliberate and intentional" . 1473) and

> "guilty of 'extreme and exceptional conduct' constituting a 'gross fraud' which was 'intentional and deliberate'". (R. 2035)

applied Ohio law and awarded compensatory and punitive damages d attorneys' fees (R. 1474, 2038, 2149-50). It dismissed the ntract count (R. 1470).

Smith's appeal and brief challenge the judgment. Hill is concurrently filing its Answering Brief supporting the C findings and judgment on the fraud count; except as raised Cross Appeal.

CONCISE STATEMENT OF THE CASE ON CROSS APPEAL

Questions Involved:

Do Hilltop's Contentions* state antitrust violations w entitle it to jury trial against the Smith defendants?

If so, do these same facts, plus those relating to Aus participation, entitle Hilltop to jury trial of the Smith d dants, and also Austin on the Sherman Act count?

Did the Court err in finding that Hilltop had failed t tain its burden of proof as to the amount of compensatory d for fraud, or for negligent breach of contract?

Did the Court err in other respects stated as Specifi of Errors and briefed successively herein in the Argument?

Manner In Which Raised:

The antitrust issues are raised by the Court's interl decision (R. 829-31) and orders of partial summary judgmen dismissal of the antitrust counts without jury trial on th in a multiple party and multiple claim case (R. 948, 950). contract count is raised by the Court's Memorandum Decisio

*R. 651ff, 680-9, and Affidavit, R. 567-70, incorporated b ence, R. 689-90, 2300-2, 2421-2.

tober 27, 1965 (R. 1470). No orders under F.R.Civ.P. 54(b) 28 U.S.C. §1292(b) were entered (R. 948, 950). Appeal became mely only after the Orders were included in the Court's Final dgment entered May 16, 1966 (R. 2146, 2148). School District . 5 v. Lundgren, 259 F.2d 101 (9th Cir. 1958); Lundgren v. eeman, 292 F.2d 489 (9th Cir. 1961).

The compensatory damages issue on the contract and fraud unts is raised by the Court's finding that Hilltop failed to et its burden of proof (R. 1470, lines 5-21). Hilltop believes at, after review, this Court will conclude that this finding was clearly erroneous under F.R.Civ.P. 52(a) as to leave the defin- e and firm conviction that a mistake was committed. United ates v. United States Gypsum Co., 333 U.S. 364, 395, 68 S.Ct. 525, L.ed. 746 (1948).

The other questions presented are related and stated in the ecification of Errors below.

Statement of Facts:

Hilltop's counter-statement of facts of the Court's findings actual and gross fraud in Hilltop's separate Answering Brief that issue are the same facts incorporated into the breach of ntract and antitrust counts (R. 7-8, 111-2) and contentions . 690). To avoid repetition, they are incorporated by reference.

A. Intrastate Commerce.

The parties agreed that Ohio antitrust law, Baldwin's Ohio

Rev. Code, ch. 1331, and the Sherman Act, 15 U.S.C., §§1 a
(R. 831) are the same. A substantial number of alleged ac
in intrastate commerce. They were incorporated by referen
the interstate antitrust count (R. 690).

B. Interstate Commerce.

Defendants, the Smith partners and executives, were e
in interstate commerce in conducting a nationwide and inte
business of real estate counseling and development with of
throughout the United States and elsewhere (R. 681). Negot
between Hilltop and Smith were conducted generally by inte
mail and interstate telephone (R. 681). Defendant Austin
of the nation's largest engineering and construction compa
with offices throughout the United States and overseas (R.
The Smith defendants and Austin negotiated with various na
and interstate chain and department stores to lease space
Severance (R. 681). They furnished various Smith-Austin b
to department stores in New York (R. 681).

The Higbee Co. is a Cleveland department store and pa
a national chain. The Halle Bros. Co. is another Clevelan
partment store and it has another department store at Erie
Pennsylvania. Both stores make substantial purchases fro
the State of Ohio (R. 681).

The construction of the $16,000,000 Severance Shoppi
involved substantial purchases and shipments of materials,

ıd supplies from outside the State of Ohio (R. 682). The fin-
ıcing of the purchase and construction of Severance Shopping
enter involved interstate and international negotiations (R. 682).

C. Restraints of Trade.

The conspiracy of the Smith defendants and those of Austin
ich restrained the development of a regional shopping center at
twood impeded a substantial flow of commodities in interstate
d foreign commerce for its construction, and a substantial vol-
e of goods that would have been bought at wholesale and moved in
terstate and foreign commerce and sold at retail at Nutwood; and
not insignificant quantity of goods that would have been resold
retail for delivery to interstate and foreign commerce. It
peded financing of Nutwood through channels of interstate and
reign commerce (R. 682).

D. Relevant Market.

The relevant market consists of sites for regional shopping
nters to serve the entire east side of Greater Cleveland, Ohio
. 683). The term "regional shopping center" was defined in
ith's report on Nutwood (App. to Ex. 29; Ex. 225) as follows:

> ". . . A regional shopping center is generally designed to serve a trade area population of from 150,000 to 400,000 people. The size . . . may range from 350,000 square feet to over 1,000,000 square feet. Department stores are the dominant tenants, and normally occupy about one-third to one-half of the total area. The function of such a center is to create complete comparison shopping facilities with a strong attraction for customers living as much as 10 to 15 miles from the

site, depending, of course, upon existing competitive facilities, access routes, etc. The area of stronges influence for such a center normally extends from thr to six miles from the development . . ."

Such regional shopping center sites should come as cl possible to fulfilling eleven standard requirements enumer Larry Smith's book, "Shopping Towns USA" (1959). Its firs criterion provides:

> "1) The site must be located in the general area established as most desirable by the economic survey . . ."* (R. 683; Ex. 368, p. 38)

Nutwood fulfilled all of the eleven ideal requirements* bu part of both the fraud and antitrust conspiracy, Smith dec Hilltop as to Item 1 by making its false and fraudulently tive "economic survey" on the potentials of Nutwood for a shopping center (R. 683-4; cf. R. 651-80, 690).

E. Antitrust Violations Alleged.

Defendants, the Smith partners and its executive offi as one group, and also Smith and Austin as another group, the Ohio antitrust laws and the Sherman Act and combined c skill and the acts of two or more persons, and entered int binations and conspiracies to unlawfully restrain intrasta interstate and foreign trade, with intent to do so; and at to monopolize for the purpose of preventing the developme

---

*The eleven requirements are quoted in the analysis showi Nutwood fulfilled all requirements (Argument, Section D,

mpetitive regional shopping centers in the eastern suburbs of eater Cleveland, including those at Beachwood and at the subject twood property (R. 684).

The Smith-Austin conspiracy proceeded through four stages:

(1) The first stage began April 23, 1955, when Austin en-ged Smith as its real estate consultant and market analyst to velop a regional shopping center at Severance (R. 684). During is period, they conspired to dominate the relevant market rough persuading The Higbee Company and The Halle Bros. Co. by anted reports to "marry the competition" and divide the market as to eliminate potential competition from other shopping center tes; and by taking all possible steps to "avoid the risk of a ird development taking place" so as to dominate the entire east de of Cleveland (R. 684-5).

On June 11, 1957, Austin arranged a meeting between "The lle Bros. Co., Larry Smith & Company and Austin Company repre-ntatives". At that meeting, defendants Austin and Smith pre-nted an agenda which urged Halle to join The Higbee Company as o major department stores in Severance to:

> ". . . preclude* construction of competitive facilities . . ."

d to:

> ". . . preclude the development of a substantial amount of specialty store space . . ." (R. 567-8)

---

he quotations are from pretrial exhibits, depositions, etc. All mphases herein are from emphases supplied in Hilltop's Conten-ions and Affidavit unless otherwise noted.

Austin participated with Smith in advancing these "ec
arguments which Austin has described as "slanted" to persu
both department stores, by differently phrased approaches

"marry the competition"

in order to keep the Severance Shopping Center "dominant"
to try to:

> ". . . avoid the risk of a third development taking place" (R. 568)

Similarly, in the meeting planned by Austin and Smith
try again to persuade Halle to join Higbee at Severance, A
notified Smith that:

> ". . . we would like to control the meeting . . ." (R. 568)

Smith prepared for Austin brochures for distribution
potential lessees. An illustrative brochure discussed oth
potential competitive shopping center sites in the eastern
Cleveland suburbs, in the municipality of Beachwood, about
miles from the location of Severance. This brochure cauti
against Beachwood as follows (R. 568):

> "Of course, if both Higbee's and Halle's locate at [Severance], the Beachwood locations might be regarded as future competitive threats.
>
> "We believe that the threat imposed by the availability of Beachwood is virtually eliminated by the lack of an effective major tenant competitive with either Higbee or Halle." (Emphases in text.) (R. 568-9)

Higbee, in summarizing a telephone conference with Treiger, nt a copy of its summary to Austin "just so that everyone is pt fully informed of the others' activities". That summary ates in part:

> "The two stores of Halle's and Higbee's when combined together with a well-planned group of supporting stores should produce the most effective competition against the new May Company store and should stop further suburban erosion of department store type merchandise sales on the East side of Cleveland for a great number of years." (R. 569)

Austin and Smith continuously urged:

> ". . . the necessity for both department stores to get off the stick . . . and start actively negotiating . . ."

order to have:

> ". . . enough department store space to dominate the east side . . ." (R. 569)

(2) The second stage began on May 29, 1958, when Austin de- ded to abandon its role as a shopping center developer of verance and notified Smith of its decision and requested Smith's lp in disposing of Severance. During this period, they contin- d their efforts described above to dominate the east side mar- t. The motive shifted to one of obtaining for Austin the high- t selling price. During this period, Austin was the seller and ith the broker consultant. Smith's efforts to find an outside yer for Severance at the price and conditions set forth by stin were limited and unproductive (R. 685).

(3) The third stage began December 15, 1958, when Smi came interested in buying Severance from Austin. During th period, Austin and Smith negotiated their unique buy-and-se agreement. Austin gave Smith the exclusive right to negoti purchase of Severance and Smith gave Austin the exclusive r be the engineer, architect, and building contractor of Seve without competitive bids. During this period, Smith and Au continued their efforts to dominate the east side market (R

Near the end of this period, on December 22 and 23, 19 Higbee and Halle, two of the three leading Cleveland depart stores, signed 25-year leases as the major tenants of Sever thus culminating over four years of Smith-Austin efforts to a shopping center strong enough to dominate the east side and preclude competition of other potential shopping center sites (R. 686).

At this time, Smith succeeded in its pursuit of Hillto make the market study of Nutwood, which had coincidentally as a threat to the Severance monopoly. Smith knew that if not procure the Nutwood job, there were other analysts who render an objective report (R. 686).

Smith's abortive and falsified report was concluded w a few days and delivered on January 8, 1960 (Ex. 29). In of their disappointment, Hilltop and the owners were persu by Treiger on January 18, 1960, to "accept" the report (R.

The discouragement of Nutwood was a necessary step to ith's continued success because a favorable report on Nutwood uld have meant competition for Severance. Any publicity favor- le to Nutwood could have upset the Austin-Smith negotiations th Higbee and Halle, and the development of Severance (R. 686).

Treiger, in urging Higbee and Halle to "marry the competition", inted out "two other important advantages" that would accrue to ch of the stores by locating together:

> "'1. They would gain a fuller insight into and control of the operations and promotions of the other store with mutual advantages accruing to both.
>
> "'2. If the two companies developed together there would be a smaller amount of specialty store competition than would arise if the stores were to locate at different sites.'" (R. 688)

Higbee's main downtown store has signs on its first floor ading, "Higbee's will not be undersold". But at Severance, the gbee branch located in the same center with Halle has no such gn (photos available). (R. 688)

On February 10, 1960, the Austin-Smith agreement to sell verance to Smith (R. 670) was executed (R. 686). This was a cret non-publicized agreement (R. 686).

(4) The fourth and present stage began March 28, 1962, when stin reacquired a 30% interest in the Severance Center (R. 687). e project was opened in November 1963. Since that time, Smith d Austin have jointly enjoyed the results of their combination

and conspiracy to restrain trade and to monopolize by domi
the relevant market to assure profitable revenues to both
them from shopping center tenant leases based on square fo
and sales, and capital gains accruing from increased resid
land values (R. 687).

Smith's advice was at all times adopted and followed
Austin (R. 687).

Austin's entire file on the economic development of Severance Center from May 2, 1955, to August 29, 1958, is teriously missing. They were in two steel cabinets at the Austin closed the doors of its Severance office for the la time on August 29, 1958. It is an unusual thing for Austi turn over its files to any company. They were still there Smith visited the property on February 16, 1960. They wer produced by any of the defendants (R. 687).

Austin and Smith are unable to account for their disa ance (R. 569). Austin claims these papers were turned ove Smith. Smith claims no papers were turned over to it exce tain corporate papers and some architectural drawings, etc The content of these two steel filing cabinets as to memor meetings, or letters written to prospective tenants, or ot that may relate to this Complaint is unknown (R. 570).

They must have contained many important items. For e the restrictive terms of earlier drafts of the leases for

tablishment of branch stores by Higbee or by Halle were not re-
aled in any papers tendered by Smith or by Austin. They were
rst received from the Higbee and Halle tenders pursuant to the
der of the Ohio court (R. 687-8). The exact terms of the de-
rtment store leases have not been produced because the court
itially upheld Smith's objection to their production on the
ound they would disclose terms to Hilltop which might be en-
ged in a competitive business (R. 688). The leases apparently
ntained, at least in earlier drafts, certain restraints upon
partment store tenants not to establish other branches within
ree to five miles of Severance. The department stores protested
. 688). The effort to impose these restraints is further admis-
ble evidence of an intent to restrain trade and to monopolize
. 688).

The only fact established through witnesses examined thus
r is that the papers comprised Austin's entire file on the
verance project and are missing (R. 570). The absence of these
pers is circumstantial evidence supporting these contentions
. 687).

The conspiracy to restrain trade unreasonably and to monopo-
ze or attempt to monopolize, which started in 1955, continued
impeded with the elimination of Nutwood. Severance opened in
63 and "from the beginning has been successful" (R. 689).

Smith's false report on Nutwood deprived Hilltop of th one essential ingredient to develop another regional shopp center. The property would have supported such a center (

If Hilltop had received a true report, it would have able to sell the property to others at its true value for promising regional shopping center site; or, alternatively have developed the property, together with the owners or o by attracting a major and/or junior department store and th other satellite tenants which support a regional shopping (R. 689).

The Smith and the Austin defendants' wrongful acts we proximate cause, with the foreseeable result, of Hilltop's in selling Nutwood at $3,500 per acre when its true value minimum of $17,500* per acre (R. 689).

Smith-Austin defendants' wrongful acts were concealed not discovered until they produced portions of their files suant to discovery beginning September 1963; a second grou files were produced April-May 1964; a third group, October November 1964; and a fourth group not produced until Decem 1964 - after the scheduled group of eastern depositions ha terminated (R. 689).

All the foregoing was with the intent to restrain tra

* $20,000 in text (R. 689). Changed to conform to evidenc Argument, Sec. E, p. 68; Ex. 334A, p. 9.

attempt to monopolize for the purpose of preventing development other competitive shopping center sites in Eastern Cleveland upra, R. 683, 684).

F. Breach Of Contract.

The breach of contract contentions (R. 677-9) incorporated reference the additional facts alleged in the fraud and anti-ust contentions (R. 690).

SPECIFICATION OF ERRORS ON CROSS APPEAL

It is respectfully submitted that the Trial Court erred in e following respects:

1. In concluding that Hilltop's Contentions and Affidavit d not state antitrust violations against the Smith defendants d executives, as well as Austin (R. 827, 831, 950, 953), thereby nying jury trial on the merits (R. 9, 114, 1053-4, 2147-8).

2. In failing to find that Smith wilfully concealed from lltop the substantive information in its prepared but undelivered troduction to the Nutwood market analysis, which concealment sulted in damages to Hilltop (Ex. 175).

3. In finding that Hilltop failed to prove that the con-usions reached in the Nutwood market analysis (Ex. 29) were ong, and in finding that the errors in the report were inconse-ential (R. 1469, line 32; R. 1470, line 1; R. 2030, lines 8-10).

4. In finding that Hilltop failed to establish by the quisite burden of proof that, as a result of Smith's fraud and

breach of contract, Hilltop had sustained substantial dama in the sale of the Nutwood property (R. 1469 at 1470, line

5. In rejecting the testimony of Hilltop's expert ap on the ground that it was predicated somewhat on hindsight on information not available at the time of, or prior to, sale of Nutwood, and in holding that comparable sales were probative of the value of Nutwood (R. 1469 at 1470, lines

6. In holding that Hilltop's evidence was speculativ conjectural with respect to finding a buyer for Nutwood at higher price if it had received a favorable market analysi Smith (R. 1469 at 1470, lines 24-30).

7. In dismissing the contract action on grounds of f to sustain burden of proof, or of speculative damages (R.

CONCISE SUMMARY OF ARGUMENT ON CROSS APPEAL

The Trial Court erred in granting partial summary jud and dismissal of the antitrust counts because there were s stantial disputed facts alleging prima facie antitrust vio "where motive and intent played leading roles and the proo largely in the hands of the alleged conspirators, and hosti witnesses thickened the plot."* Hilltop was entitled to j trial on the direct and circumstantial evidence and all r inferences alleged in its Contentions on these Counts.

---

*Poller v. Columbia Broadcasting System, 368 U.S. 464, 47 486, 7 L.ed.2d 458 (1962).

The Court erred as a matter of law in rejecting the testi-
ony of Hilltop's expert appraiser on the ground that it was
redicated somewhat on hindsight and in therefore concluding
hat Hilltop had not sustained its burden of proof. Therefore
his Court, under F.R.Civ.P. 52(a) should remand the proof of
mages to the Trial Court for reconsideration of the present
ecord and rehearing to the extent this Court directs.

Argument on each Specification of Error is stated below.

ARGUMENT ON CROSS APPEAL

A. Hilltop Is Entitled to Jury Trial Of Its Antitrust Counts. [Spec. of Error No. 1].

The Trial Court accepted as true Hilltop's Contentions and
s Affidavits (R.555-589, 624-650) incorporated by reference
.2421-2) and all reasonable inferences to be drawn therefrom
.829, lines 6-10; 651 ff). It correctly found that:

> " . . . plaintiff's basic complaint is the submission to it by Smith of a false market analysis report which caused Hilltop and the Winslow sisters to sell the Nutwood property at a price substantially below that which they could have obtained if they had sold it for shopping center development. Smith's alleged objective was the suppression of potential competition to its Severance shopping center. Austin is alleged to have conspired with Smith in the general objective of restraining shopping center competition . . . (R. 829, lines 10-19)

t it concluded that:

> " . . . no contention is made that Austin conspired in any way specifically with respect to Nutwood." (Emphasis supplied) (R.829, lines 19-20)

Hilltop submits that a "specific" conspiracy against wood is not required. It is sufficient, if a jury could pr find from all the evidence supporting the contentions and r able inferences, that it was reasonably foreseeable that Hi as agent, and the Winslow sisters, as owners of the Nutwood erty, would be damaged in their property by selling it at l than its fair value because of Smith's fraud coupled with S and Austin's objectives to suppress potential competition f any other regional shopping center sites in the eastern sub of Greater Cleveland, including Nutwood (R.683-4).

Many cases have considered the "target area" issue. It is unnecessary to review the earlier cases because of tw cent controlling decisions by this Circuit:

Twentieth Century Fox Film v. Goldwyn, 328 F.2d 190, (9th Cir. 1964), concludes:

> " . . . there is language [in prior cases] indicating that one was not in the 'target area' unless he was 'aimed at' by the conspirators.
>
> "But in using the words 'aimed at' this court did not mean to imply that it must have been a purpose of the conspirators to injure the particular individual claiming damages. Rather. . . the plaintiff must show that, whether or not then known to the conspirators, plaintiff's affected operation was actually in the area which it could reasonably be foreseen would be affected by the conspiracy."

Harman v. Valley National Bank, 339 F.2d 564 (9th Ci. rejected a narrow construction of the target area and hel these limitations do not appear in §4 of the Clayton Act,

5 U.S.C. §15, and held that courts:

> " . . . should not add requirements to burden the private litigant beyond what is specifically set forth by the Congress . . . " (339 F.2d at 567)

Nutwood was admittedly in the Severance trade area (R.1189) nd therefore in the "target area". Hilltop should be entitled o prove to a jury its reasonably foreseeable damages.

The Court also erred in assuming the necessity of connecting Smith and Austin to establish a conspiracy. Smith is a artnership -- not an entity. All of the Smith partners and reiger were alleged to have violated the antitrust laws on substantially the same facts as in the fraud count. On many of the ame facts alleged in Hilltop's antitrust contentions, it held:

> " . . . the competitive positions of Nutwood and Severance, and other suspicious circumstances fully justified the prosecution of the fraud and contract counts . . . and also . . . the antitrust counts up to a point which the court need not determine . . . " (R. 2030).

t found Smith guilty of gross fraud for "extreme and exceptional onduct" which was "intentional and deliberate". (R. 2035) A ury could find them guilty of the antitrust violations, proximately resulting in substantial damages to the Winslow sisters nd Hilltop from the sale of their property even though, on the raud count, the Court held that the burden of proof was not sustained. In Fox West Coast Theaters Corp. v. Paradise T. Building Corp., 264 F.2d 602, 605 (9th Cir. 1958), this Court held:

> "It makes no difference that the jury found the facts and the intentions of the parties proved a conspiracy

here, whereas a trial judge, sitting without a jury, found to the contrary on somewhat similar facts . .

While no Austin witness testified before it defied d ery (R.416 ff.), or before the Court's pretrial freeze ord Austin "conspired [as] to Nutwood" (R.829, line 20), this required since a jury could find that Nutwood was in the area" defined in Goldwyn, supra. It is enough that Aust spired with Smith

> " . . . in the general objective of restraining shop ping center competition" (R.829, lines 18-19).

Nor is it required to show "simultaneous action or agreem Smith and Austin.

> Interstate Circuit v. United States, 306 U.S. 208, 227; 83 L.ed. 610, 620.

The Trial Court also erred in concluding that Peters Borden Co., 50 F.2d 644 (7th Cir. 1931), was a controllin cedent. It was an early §7, Clayton Act case, 15 U.S.C. Court construed it by substituting the two words "persons "property" as follows:

> " . . . The statute was not designed to give to stoc holders (persons) who have been defrauded in the sa of their stock (property) treble damages for their injuries, nor indeed any new or additional remedy for such injury. If they have been thus defrauded, th law aside from the anti-trust statutes affords ampl remedy." 50 F.2d at 645, 646. (Emphases added)(R.

It erroneously drew an analogy to Hilltop and held:

> "Hilltop and the sisters have an ample remedy indee since under Ohio law they may recover punitive dama [for fraud] which could conceivably total more than

t was error to conclude that because there is fraud and puni-
ive damages, additional counts for antitrust violations are
arred. Both "unlawful" and "fraudulent" acts may be alleged
nd proved in an antitrust action.

> Harman v. Valley National Bank, 339 F.2d 564 (9th Cir. 1964);
>
> Walker Process Equipment, Inc. v. Food Mach. Chem. Corp., 382 U.S. 172; 86 S.Ct. 347; 15 L.ed 2d 247, 252 (1965).

This Court has recently held that a breach of fiduciary
ıty does not preclude an antitrust action:

> Rangen, Inc. v. Sterling Nelson & Sons, 351 F.2d 851, 857 (9th Cir. 1965).

: distinguished "observations" in United States v. Boston & M.
. Co., 380 U.S. 157, 162, 85 S.Ct. 868, 13 L.ed.2d 728, that

> " . . . Bribery might well be in the family of offenses covered under a conflict of interest statute. But it is more remote from an antitrust frame of reference . . ."

nd held under the Robinson-Patman Act, 15 U.S.C. §13(c):

> "We do not regard the quoted observation as a definitive ruling that under no set of circumstances could commercial bribery be violative of any antitrust law. In our case the bribery not only undermined a fiduciary relationship which Congress sought to protect, but gave one seller a grossly unfair advantage over a competing seller. Where commercial bribery is associated with evils which a particular provision of the antitrust laws was designed to prevent, the fact that it was bribery rather than a more defensible arrangement ought not to preclude application of the statute."

In Hilltop, the Trial Court described Hilltop's claim as
ne for "fraudulent breach of a fiduciary duty" (R.829) and found:

> "By the very nature of the relationship between the parties, the plaintiffs had a right to rely on an absence of such a conflict of interest on the part of one from whom expert advice was sought." (R.1472-3)

Thus Smith's fraud likewise undermined a fiduciary relatio and caused the very anticompetitive results which Congress to prevent under the Sherman Act. It induced Hilltop to a promotion of Nutwood as a regional shopping center site wh would have been competitive with the Smith-Austin promotio Severance. Sale for less valuable uses damaged the proper interests of the Winslow sister owners and of Hilltop Real

All the other elements of an antitrust case were full forth in Hilltop's Contentions and Affidavit, i.e., the de fraud and contract allegations adopted by reference (R.559 653-679); commerce (R.680-682); relevant market (R.683-684 lations of state and federal antitrust laws (R.684-691); a cessive stages of the Smith-Austin conspiracy (R.555 at 5 R. 651 at 680-690).

Hilltop submits that the Trial Court's original Memo Decision was correct in upholding the antitrust counts.

> "Assuming the truth of the matters alleged in the co plaint . . . I am of the opinion that plaintiff stats a cause of action under the most recent decisions oft Supreme Court of the United States.* . . . I may no agree with such decisions, but follow them I must. ..

---

*"Recent decisions" cited in 1963 (Papers 15 and 18 in Dit Court Clerk's file) included: Klor's, Inc. v. Broadway-Ha Stores, 359 U.S. 207, 79 S.Ct. 705, 3 L.ed.2d 741 (1959); R Burners v. Peoples Gas Light & Coke Co., 364 U.S. 656, 8 365, 5 L.ed.2d 358 (1961); Continental Ore Co. v. Union C & Carbon Corp., 370 U.S. 690, 82 S.Ct. 1404, 8 L.ed.2d 7 Re McConnell, 370 U.S. 230, 82 S.Ct. 1288, 8 L.ed2d 434 U.S. v. Southeastern Underwriters Assn., 322 U.S.533 at

[d]efendants' motion to dismiss the Sherman Act claims . . .[and] the Ohio Antitrust Act [claim] will also be denied . . . without prejudice to their being again raised by defendants after the entry of a pretrial order." (R. 21, App. A)

illtop's Contentions supported each count of its amended com-laint with detailed pre-trial record references (R.656-691).

Summary procedures are not precluded in antitrust cases.

Tillamook Cheese & Dairy Assn. v. Tillamook Cheese Assn., 358 F.2d 115, 117 (9th Cir. 1966).

ut as this Court noted, the Supreme Court has admonished:

"We believe that summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot [citing cases]. It is only when the witnesses are present and subject to cross-examination that their credibility and the weight to be given their testimony can be appraised. Trial by affidavit is no substitute for trial by jury which so long has been the hallmark of 'even handed justice.'"

Poller v. Columbia Broadcasting System, 368 U.S. 464 473, 82 S.Ct. 486, 7 L.ed.2d 458, 464 (1962).

ignificantly, in Poller, the dissenting minority stated:

"In this case petitioner, the party opposing the motion, had complete access by means of pretrial discovery to all the evidence he could marshal at a trial on the merits. 6/" 368 U.S. at 478, 7 L.ed.2d at 467.

ts supporting footnote 6/ for this minority view stated:

"'There is no suggestion that petitioner was not afforded opportunity to examine any witness he wanted, either before or after respondents made their motion for summary judgment.' ibid."

n contrast here, discovery was incomplete because Austin defied iscovery. It terminated one Cleveland deposition and refused

to produce its president and other witnesses (R.416, 421). Court found Austin's action "was inexcusable", awarded att fees (R.954), and stated that if it concluded that Hilltop Contentions supported antitrust counts, it would require A at its own expense, to produce each of those Cleveland wit at Seattle for further depositions (R. 2312). Meanwhile "freeze" order stayed further discovery pending rulings on and Austin's motions. When the Court granted these motion 829-831), further antitrust discovery was rendered moot pe remand if this Court upholds the cross-appeal.

The Court found from Hilltop's Contentions that Smith alleged objective was ". . . the suppression of potential petition to its Severance shopping center . . ." and that was alleged to have conspired with Smith

> ". . . in the general objective of restraining shopping center competition" (R.829).

It is for a jury to determine, regardless of self-serving of knowledge or participation, whether in fact Smith and severally or jointly conspired to violate the Sherman Act intent to preclude competition in regional shopping centes in eastern Cleveland, Flintkote Co. v. Lysfjord, 246 F.2d 374-5 (9th Cir. 1957), and whether it was reasonably foree that Smith would cause Hilltop to "accept [Smith's] concls (R.1212) and sell their property for other uses.

Hilltop submits that the orders dismissing its antitus

unts should be reversed and remanded for jury trial on the rits; and a reasonable attorneys' fee should be awarded on is part of the Cross Appeal.

B. Smith Damaged Hilltop By Wilfully Concealing Vital Information Contained In Its Undelivered INTRODUCTION to the Nutwood Analysis. [Spec. of Errors Nos. 2, 7]

In exchange for Hilltop's $2,920, Smith delivered an alysis dated January 8, 1960, entitled "Shopping Center Opportunities at Nutwood Farms" (Ex. 29). That was all. A three-ge cover letter of January 7, 1960, was included as a part of e analysis. It contained the following statements:

> ". . . Competition, particularly in the department-store-type-merchandise categories is very substantial. (Emphasis in text).
>
> . . .
>
> "The preceding factor is particularly responsible for the conclusions of our analysis with respect to Nutwood Farms . . .
>
> * * *
>
> "In summary, our study indicates an absence of a sufficient volume potential to justify the interest of major tenants, and the absence of a sufficient investment opportunity to justify the development from the standpoint of the property owners." (Ex. 29, cover letter, pp. 1-2).

During the course of the pre-trial discovery, well after e commencement of this action, Hilltop was tendered certain rk papers used in the preparation of the analysis, now desig-ted as Exhibit 175. They include an "INTRODUCTION"* (the bot-m three pages on the right hand side of the Exhibit) marked OT USED IN REPORT" and "None of this used in rpt to client". at "Introduction" includes the following language:

" . . . we have undertaken the analysis of both . . . conventional department store business . . . and also the market for a store of unusual merchandising characteristics such as would be typified by Sears Roebuc or Montgomery Ward . . .

" . . . We find that virtually every significant department store operating in Cleveland has already undertaken a branch program in one form or another and that with the exception of Sterling-Lindner-Davis (Allied Stores) and Taylor's, there are no Cleveland stores not already represented in locations which wou appear to compete with their own store on the Nutwood Farms site.

"One major store possibly interested in Cleveland but not now represented is Montgomery Ward. While Ward's are not now operating in any major way in the Clevela area, some market we believe will exist for a Montgom Ward store on the proposed site, and to that end we have attempted to define the extent of this opportuni specifically because Montgomery Ward appears to repre sent a logical choice for a key tenant." (Ex. 175, "Introduction", p. ii)

A comparison of Exhibit 29 with the undisclosed "Intr tion" is revealing. Exhibit 29 does not point out, direct indirectly, the market for a store such as Sears, Roebuck Montgomery Ward; nor "that virtually every significant dep store operating in Cleveland has already undertaken a bran program"; nor that Sterling-Lindner-Davis or Taylor's are only exceptions; nor that Montgomery Ward was a "logical for a key tenant". (Ex. 175).

One entire section of the analysis, entitled the "Sh the-Market Approach", does, however, use extremely low pe figures (5%, 10% and 15%) (Ex. 29, pp. 6-7), without expl and without any reference to the material contained in th

ery significant department store operating in Cleveland has
ready undertaken a branch program" was, in fact, the sole
ason that such low percentage figures were used in the "Share-
-the-Market Approach", according to Smith's witnesses, Treiger,
rshall and Kelly (Tr. 1567, 1676, 2199). But this was not
sclosed in the analysis or, indeed, at all until after com-
ncement of pretrial discovery (Tr. 2513-4).

Darmstadter, the field man who gathered the statistical in-
rmation on which Exhibit 29 was based (Tr. 1713-13A, 1719-20),
stified that the unused "Introduction" summarized the findings
Exhibit 29 in detail "with regard to . . . department stores",
d that paragraphs from the "Introduction" noted above would
ve been valuable to Hilltop (Tr. 837-8). His testimony is
disputed and obvious.

The failure to provide either the "Introduction" or the
terial which the "Introduction" asserts to have been gathered
nstituted a deliberate withholding of material information re-
ting directly to the contract between Hilltop and Smith. The
alysis (Ex. 29) was therefore a breach of contract and a fraud
Hilltop, independent of Smith's concealment of its impending
rchase of Severance, and equally independent of the accuracy
the statistical material which actually did find its way into
hibit 29. The fact that these affirmative suggestions in the
ntroduction" were not retained in the analysis (compare "the

competitive situation is rather severe", Ex. 175, p. ii, 9
with "an absence of a sufficient volume potential to just
interest of major tenants", Ex. 29, cover letter, p. 2, T
peaches the objectivity or accuracy of the balance of Exh

Why was the "Introduction" withheld? The decision wa
Treiger's (Tr. 1576). The report writer, Marshall, "was a
more fearful of competition than Treiger was" (Tr. 1670).
"Introduction" which Marshall drafted termed the competit
"severe" but suggested that there were possibilities for
ment store tenants at Nutwood. Yet Treiger's cover lette
Exhibit 29, submitted in lieu of the "Introduction", state
the paragraphs noted above, that competition was so substa
as to indicate

> " . . . an absence of a sufficient volume potential
> justify the interest of major tenants, and the absen
> of a sufficient investment opportunity to justify th
> development * * *." (Ex. 29, cover letter, p. 2)

Thus, the man less fearful of competition overruled the m
fearful of competition. On what basis? Competition! Th
claimed "severe" competition for Nutwood assumed that Sev
would become a rival center (cf. R.1226). But now Smith
claimed to have had only "in effect . . . an option" on
Severance from February through July 1960 (Smith Op. Br.

No one can reconstruct with certainty as of January
the precise effect on Nutwood of Smith's suppression of
"Introduction" (Ex. 175). But a tortfeasor may not use

certainty as to exact damages proximately caused by willful aud and breach of contract to defeat a victim's right to asonably established damages, Locke v. United States, 283 2d 521 (Ct. Cl. 1960), and cases cited.

C. The Conclusions of the Nutwood Analysis (Ex. 29) Were Clearly Erroneous and Fraudulent. [Spec. of Errors Nos. 3, 7]

A thoughtful comparison of the Nutwood Analysis (Ex. 29) th the work papers upon which it is based and contemporary alyses by Smith of competing locations, including Severance, n result in only one conclusion: The conclusions of the alysis were totally wrong.

There is no dispute as to Smith's methodology in analyzing e potential of a particular location for a regional shopping nter (Tr. 2130-31). First, the analyst determines the "trade ea" from which the center is expected to draw about 85% of its siness (Tr. 952; Ex. 225, p. 1). This determination was one judgment (Tr. 2341, R.1247) but Hilltop did not know this r. 231, 345). Second, the population of the "trade area" is termined from official or semi-official sources for certain st years (in the case of the Nutwood Analysis 1950 and 1959) d projected forward to the years covered by the analysis on a mple straight line basis (Tr. 1553-4, 2140-5; Ex. 175). Those bjections will be found in Exhibit 29, p. 2.

Next, per capita income is determined from official sources

(Tr. 1556, 2147-53). This information is also found in
of the Analysis, but it is not projected forward to any
years.

Following this, per capita spending figures for the
ticular types of stores under analysis are determined fo
same year (Tr. 2160-67). Those spending figures, times
population, are used as "sales potential" for various ty
stores (Tr. 1557). The latter information, for the Nutw
trade area, is found in tabular form on page 3 of the An
but the per capita spending figures are not separately s
The "sales potential" figures are thereafter reduced by
centage figure which, it is assumed, will be spent in th
tral business district, and the result is known as "subu
share" (Ex. 29, pp. 3-4).

The next step, and a vital one in this Cross Appeal
subtract from "suburban share" a figure known as "effect
competition", the result of which subtraction is a figur
as "unsatisfied sales potential" for each category of st
studied (Tr. 2131, 2170; Ex. 29, pp. 4-5). This ultimat
is found on page 5 of the Nutwood Analysis. Most of the
on that table indicate no "unsatisfied sales potential"
stores at Nutwood; in fact, the exercise in subtraction
they were derived actually resulted in a negative figur

It is because of the almost total absence of unsat
sales potential, especially for department stores, thatt

nclusions of the Analysis were completely negative (Ex. 29, 5; cover letter pp. 1-2).

The Nutwood Analysis does include major errors resulting om carelessness which also contributed to its negative conclu-ons. For example, Census Tract LC-4, located partly in the imary trade area of Nutwood and partly in its secondary B trade ea, had an estimated 1970 population of 14,000, but only 298 those people were actually used in connection with the alysis (Tr. 2220). The correct figure, multiplied by per oita department store spending and reduced by the suburban are percentage, would have added $1,400,000 to the department ore suburban share figures for 1970, and a proportionate ount for 1962 and 1965 (Tr. 2219-2222).

By the same token, an admitted error in the Analysis in ating the Sears Store at Shoregate to be 70,000 square feet in ze rather than 40,000 square feet, resulted in over estimating "total sales capacity" by $2,100,000 and its "effective mpetition" within the Nutwood trade area by $1,785,000 (Tr.1207-2284-85).

Each of these errors rendered the conclusions of the Nutwood port substantially more negative than they should have been en admitting the accuracy of the Analysis in every other res-ct. But in spite of these grave errors, the falsity of the nclusions of the Nutwood Analysis is based almost exclusively Smith's misuse of its own concept of "total sales capacity"

and "effective competition" in the report. It was for th reason that respondents' expert, Dr. Reinstra, accepted, the purposes of Part I of Exhibit 330 only, the accuracy practically everything else in the analysis for the purpo of his expert critique of its conclusions (Tr. 1145; Ex.

"Total sales capacity", as defined and used by Smith Exhibits 29 and 225, is a precise estimate of the amount business which will be done by existing or planned compet stores after the construction of the facility under study and "effective competition" is the portion of that busine which Smith determines will be done within the trade area the proposed facility (Nutwood) by the competitive store the dates covered in the analysis of the proposed facili Once this position is accepted, the conclusion that the analysis was false is inevitable.

The accuracy of this proposition would seem to be a self-evident, but beginning with pretrial discovery in t igation, Smith witnesses attempted repeatedly to render he inition more fuzzy and less specific, and to change it fr estimate precise in time, nature and amount to a highly en ized, vague concept, wholly inapplicable to any specifi da (Tr. 1013-4, 1323-4, 2715, 2175-6, 2364-7). The reason for attempt is obvious. If "effective competition" is a pr estimate, applicable to specific dates, of the amount o

egional shopping center at Nutwood, it is a representation of act. If that representation is false, the error constitutes ither a separate and additional fraud or a separate and additional breach of contract. If the representation is knowingly alse, or is made with reckless indifference to its truth or alsity, it is fraudulent; if it is simply the result of negli-ence or carelessness, it constitutes a breach of contract. In ther event, it is such a vital element that its falsity would avalidate the entire report, and especially the negative con-usion as to the potential of Nutwood as a regional shopping enter. This Court may come to that conclusion from the Analysis d its workpapers and depositions alone; it does not involve a allenge to the credibility of any witness who testified in per-n at trial.

If, on the other hand, "effective competition" is a vague, eneralized concept, unrelated to any specific date or time and ually unrelated to the amount of business which a given com-etitive facility may generate, it is much more difficult, of ourse, to attack it as a material misrepresentation, though it equally difficult to determine what it is good for in a shop-ng center analysis.

In order to determine whether or not Exhibit 29 contains aterial misrepresentations of fact, this Court must decide hat "effective competition" means in that Analysis.

Exhibit 29, as delivered to Hilltop in January 1960, c
tains definitions of both "total sales capacity" and "effec
competition". These definitions were physically included
Exhibit 29 as delivered to Hilltop but are also separately
cluded in the record as Exhibit 225. The definitions read
follows:

> "Total Sales Capacity - Capacity as used throughout this report refers to the estimated amount of sales volume that existing retail facilities are capable of obtaining and holding under normal competitive conditions when adequate facilities with competent manag ment are available to customers. In no way does the use of the term connote maximum physical capacity of given plant to obtain a given volume. It is, rather, an estimate of the amount of business that would be expected to be retained by existing stores in the face of competition from new facilities when customer are free to choose from a wide variety of stores.
>
> "Effectiveness - Effectiveness refers to that portion of the total sales capacity of a competitive unit or group of stores which the unit or group obtains from within the subject trade area. This term refers to e estimated effect which existing competitive facilitie will have in the subject trade area after the propos shopping center is constructed." (Emphasis in text)

The terms "effectiveness" and "effective competition" are y onymous (Tr. 802-3).

At page 18 of Exhibit 143, a 1961 market analysis of Severance, prepared by Smith, the term "effective competi is defined in almost identical fashion:

> "This figure represents the volume which these compe- itive facilities would probably continue to obtain o within the Severance Center trade area, even after e development of Severance Center and, hence, repres volume which would not be available to the faciliti at Severance Center."

Appellants' witness, Mr. Marshall, actually determined the total sales capacity" and "effective competition" figures in xhibit 176, which were used in Exhibit 29 (Tr. 1667-9). He estified that "effective competition" is an estimate of the mount of sales which will be drawn from the trade area of the acility under study by a competing facility after construction f that facility on the dates to which the study is directed Tr. 890-1, 1692-3, 1695-97). This is entirely consistent with he definitions found in Exhibit 29.

For an illustration of Smith's witnesses' inconsistency in efining the crucial concept of "effective competition", compare he written definition contained in the appendix to Exhibit 29, nd the testimony of Messrs. Marshall and Steichen at Tr. 890-1, 38-940, 1003-4, 1692-93, 1695-97 with the testimony of Messrs. eiger, Steichen, Smith and Kelly at Tr. 1013-14, 1323-24, 2715, 75-76, 2364-67.

Further confirmation, if any is needed, of the fact that otal sales capacity", as that phrase is used by Smith, is ith's best estimate of the business which a given facility will tually do on a fixed date in the future will be found by com- ring the "total sales capacity" used for Severance Center in nnection with the Nutwood analysis with Smith's projections of e business Severance would do in its studies of Severance, and en with the actual performance of the department stores in verance Center.

In Exhibit 176, some of the work papers for the Nutwoo analysis, the "total sales capacity" for department stores Severance Center was determined to be $22,800,000 (Ex. 176, item 38). In Exhibit 11, an analysis of Severance Center u in connection with the promotion of Severance by Smith, we that Severance's share of "unsatisfied department store pot tial" in 1975 will be $24,481,000 (Ex. 11, p. 21). Finally Larry Smith himself, with justifiable pride, stated that th figure was within one per cent of actual department store at Severance Center for the year ending January 31, 1965 (2374-75).

"Total sales capacity" is clearly a prediction of actu business at a future date, and "effective competition" thep tion of that business anticipated from a given area. It se without saying that Smith may not vary its definitions of th key phrases "total sales capacity" and "effective competitor after the fact in order to defend this lawsuit. In the ca any inconsistency, Smith's written definitions and the actu use of the concepts by Mr. Marshall, the report writer, mu govern.

The use of these concepts in the Nutwood Analysis is relatively simple. In Exhibit 29, the Nutwood Analysis, he "effective competition" of department stores competitive at the Nutwood trade area was stated to be in the very precise of $41,255,000 (Ex. 29, p. 4). This figure is applicabl

pecifically to each of the years covered by the report - 1962, 965 and 1970 (Ex. 29, p. 5; Tr. 1695-97). Clearly this means hat the residents of the Nutwood trade area are expected to do 1,255,000 worth of business in suburban department stores mpetitive within that trade area in 1962, exactly the same ount in 1965, and the same amount again in 1970.

The population of the trade area would, of course, increase rkedly during that period of time (Ex. 29, p. 2).

Exhibit 29 also asserts as a fact that the total "suburban are" of department store spending within the Nutwood trade area 1962 will be in the very precise amount of $28,010,000 x. 29, p. 4).

"Effective competition", as it is defined in Exhibit 29's pendix (Ex. 225), as well as by Mr. Marshall, could not under y circumstances exceed "suburban share", in theory or in prac- ce, since "suburban share" is the total of all retail expend- ures in a given category of stores spent in suburban stores, d "effective competition" is the amount of business retained stores in those categories in the trade area of the suburban cility under study after its construction (Tr. 2130-31; Ex. 29, 4; appendix p. 2). Thus, either Smith's "effective competi- on" figure of $41,255,000 or its "suburban share" figure of 8,010,000, or both, is in error. Mr. Treiger, the account ecutive on the job, could not have failed to notice an error such magnitude. Moreover, the $41,255,000 figure makes no

allowance for any department store shops at Nutwood itself, though its existence was assumed in connection with the preparation of the report.

It is particularly significant that in both the Primary Secondary A portions of the Nutwood trade area, both of which are either entirely or almost entirely located within the Severance trade area (Ex. 344-E), the "effective competitive facilities in existence in 1960 is almost identical to the "suburban shares" for those areas, without considering Severance. In the case of the Primary trade area, the 1962 department store "suburban share" is shown as $5,772,000, while Ex. 176 shows "effective competition" of $5,637,000, Severance excluded. In the Secondary A area, the "suburban share" for 1962 is $7,[illegible] and the "effective competition", excluding Severance, is $7,079,000 (Ex. 29, p. 4; Ex. 176; Tr. 1158-1160).

By definition, when Severance itself was added to the formula, the "effective competition" of the other department stores should have been lessened, because the other stores could not "retain" as much business, and all of the suburban stores together could not "retain" more than the total "suburban share" (Tr. 1158-60, 2238-45).

By like measure, the assumption of a major department store in a regional shopping center at Nutwood should further have lessened the estimates of "effective competition" for the other stores, including those at Severance.

In point of fact, Smith did neither.

It would thus appear that Mr. Marshall erred seriously in is determination of the "total sales capacity" or the "effect- ve competition" figures, or both, reported in Exhibit 176 and pplied to the trade area of Nutwood in Exhibit 29.

These errors may have been due to his lack of experience n the Cleveland metropolitan area, but that lack of experience rovides no legal excuse for Smith, which assigned him to the ob. Mr. Tierney was not assigned the job, though he had just ompleted the Severance re-analysis (see Ex. 209 A). Mr. Treiger as account executive on both the Severance job and the Nutwood ob. He knew Cleveland well. He supervised and corrected r. Marshall's work and could not have failed to notice the sub- tantial errors in that work. Since those factual errors were arried into Exhibit 29, they constitute a misrepresentation of act by Smith. Significantly, after plaintiffs rested their ase, Smith did not call Mr. Treiger to explain or justify his pproval and revision of these figures.

The errors in Exhibits 176 and 29 become even more apparent one studies individual facilities.

First, as to Severance, Exhibit 176, item 38, indicates it be 50% effective within the Nutwood trade area, or $11,400,000.

Mr. Marshall testified specifically that these "effective mpetition" figures for Severance within the Nutwood trade area lated to the year 1962 (Tr. 1695-97). He also testified that

the percentage of "effective competition" from Severance wi
the Nutwood trade area would be lower than the percentage o
population of the trade area of Severance contained in that
"overlap" area because the per capita income of the "overla
area was lower than that of the balance of the Severance tr
area (Tr. 1697-98).

In fact, the 1962 population of that overlap area, bas
on the population figures used by Mr. Marshall, was 34.8% o
total population of the Severance trade area, and not 50%
(Ex. 372). Thus Mr. Marshall himself could not possibly h
come up with an effective competition percentage for 1962
cess of 30%, and probably should have used a lower figure
cause of the substantial differences in per capita income
(Tr. 1691-93, 1697-98).

Even 30% is too high if one considers factors such as
(1) the relative distance from Severance to the "overlap" re
(2) the effect of the competitive facilities (including Nu
itself) within the "overlap" area, and (3) the fact that e
northern and eastern boundaries of the Severance trade ar
shown in Exhibit 344E would necessarily be compressed by
of another regional shopping center at Nutwood (Tr. 1689).

None of these factors was considered by Mr. Marshall
(Tr. 1668-69, 1690-1701, 1707-1711).

In spite of these factors, and in spite even of the

n assigning a 50% "effective competition" figure to Severance, r $11,400,000, and that figure was accepted by Mr. Treiger Ex. 176, item 38).

With far less excuse, Mr. Kelly, a Smith partner and one f its expert witnesses, fell into the same error that evi- ently actuated Mr. Marshall in his determination of the "ef- ective competition" of Severance in the Nutwood trade area.

In his pretrial direct testimony, defendant Kelly testified hat the 50% "effective competition" figure used in Exhibit 176 as more reasonable than that arrived at by plaintiffs' economic xperts, Messrs. Ward and Reinstra,

> " * * * in view of the population percentages [for the overlap] which admittedly in the earlier years will be less than 50% and which by 1970 and 1980 should increase to more than 50% [of the Severance trade area population]." (Tr. 2188).

In fact, that population would not reach the 50% figure laimed by Mr. Kelly on the straight line basis used by Smith ntil some time after 1990 [1962 equals 34.8%; 1970 equals 3.7%; 1990+ equals 50% (Ex. 372, p. 1; see also Tr. 2245- 254]. The "effective competition" figures used in the prep- ration of the Nutwood Analysis are not only unreasonable but impossible.

The nature and extent of this error can perhaps best be illustrated by the following table:

EFFECTIVE COMPETITION WITHIN THE
NUTWOOD TRADE AREA (Tertiary excluded)*

(All $ figures are per capita)

	Primary	Secondary A	Seconda
1. Suburban share	- $104	$108	$ 93
2. Severance effective competition	- $ 55 -65	$ 88	$ 58
3. Severance effective competition as a percentage of suburban share	- 53-63%	81%	59%
4. All effective competition except Severance	- $102	$108	$120
5. Total effective competition	- $157-167	$196	$178
6. Total effective competition as a percentage of suburban share	- 151-161%	181%	182
7. Nutwood share	- -0-	-0-	-0-

*The source of the "suburban share" figures is the departm
store "suburban shares" on page 3 of Exhibit 29, divided b
population figures on page 2. Each zone is figured separa
This material may also be found in or derived from Ex. 17
The source of the Severance "effective competition" figur
the dollars of "effective competition" shown in Exhibit 1
vided by the populations shown in Exhibit 372; the reason
range in the primary zone is that Exhibit 372 shows the p
tion of that zone both with and without the error in Cens
Tract LC4 found in Exhibit 175 and used in Exhibit 29. T
source of all other "effective competition" figures is th
dollars of "effective competition" found in Exhibit 176 d
by the populations shown on page 2 of Exhibit 29. Item 5
the total of Items 2 and 4. Item 6 is the Nutwood share
on Exhibit 29, page 5.

The preceding table shows graphically that the entire "sub-rban share" in Nutwood's Primary and Secondary A trade zones as taken up by the "effective competition" of facilities other han Severance, but that nevertheless Severance was expected to eceive department store business from those zones of between 3% and 81% of the entire "suburban share" in that portion of ach of the zones which was also in the Severance trade area.

On its face it is impossible for Severance and its compe-ition to do a department store business in these areas of over 00%, i.e. between 151% and 182% of the entire "suburban share" f the department store business available there, when "sub-rban share" is, by definition, all of the available business.

The "effective competition" attributed to Cedar Center ithin the trade area of Nutwood in Exhibit 176, as carried over o Exhibit 29, constitutes an equally serious misrepresentation f fact.

First, there are no statistics, including Smith's own li-ense plate study of Cedar Center taken before the construction f Severance, supporting the 38% figure asserted as fact in Ex-ibit 176. Mr. Marshall's methodology, if properly utilized, ould have resulted in a figure lower than the 15.9% shown in xhibit 369 as the proportion of the 1962 population of the Cedar enter trade area (as shown in Ex. 105) overlapping the Nutwood rade area (Tr. 1692-94). On a straight-line projection, that ercentage would not reach 38% until the year 2010 [1960 equals

15.9% figure, using Mr. Marshall's methodology, would furth be reduced to reflect the fact that the people in the "over area" had a lower per capita income than those in the balar of the Cedar Center trade area (Tr. 1692-94).

Mr. Marshall's method of determining "effective compet was to consider the population of the portion of the trade of the competing facility which was also within that of th ility under study as a percentage of the population of the trade area of the competing facility, with an increase or in the resulting percentage to account for their relative capita incomes (Tr. 1691-1701).

A final illustration, this one dealing with the conce "total sales capacity", will show the cavalier attitude wi which Smith treated that concept and "effective competitio preparing the Nutwood Analysis.

Because Smith's primary methodology showed no "signifi residual potential" for a department store at Nutwood, it us a second method, called the "share of the market" approac (Ex. 29, p. 6). That approach indicates that a departmen at Nutwood would do $2,801,000 worth of business in 1962 p. 6).

The assumption upon which the analysis of Nutwood wa was that its department store would be a "normal" or a Se store (job order, Ex. 175, right hand side, fourth page u

ottom). Its size would be approximately 150,000 square feet Tr. 1330-31, 1588; Ex. 29, p. 7; appendix, p. 1).

But for some unexplained reason, while a 150,000 square oot Sears store at Nutwood would do $2,801,000 worth of business n 1962, the 40,000 square foot Sears store at Shoregate, lo- ated in the heart of the Nutwood trade area and thus appealing o exactly the same category of customers, had a "total sales apacity" of $2,800,000 [40,000 x $70 per square foot] (Tr. 894- 96, 1207-9, 1586-89, 1686, 2284-85), representing, to quote rom the definition of "total sales capacity" contained in khibit 29, appendix, p. 2, "the amount of business that would e expected to be retained by [the Sears store at Shoregate] in he face of competition from <u>new</u> facilities [a Sears store at utwood]".

If these factual errors and misstatements had been correct- d, Exhibit 29 would have been at least as favorable as Dr. einstra's Part I of Exhibit 330 as to the potential of Nutwood a regional shopping center in 1962, 1965 and 1970. Taken to- ether, the errors and misstatements changed what should have een a favorable report on a regional shopping center at Nutwood, otentially seriously competitive with that at Severance, into a port the conclusions of which were totally negative. The res- nsibility for these errors can be laid at the doorstep of . Treiger, the account executive who undertook the job and the ly person connected with it who had any experience in Cleveland,

and to those partners who should have or did review his wor

Smith's attitude toward Hilltop as a client is shown d matically by the so-called "substantiating" report (Ex. 10)

After Hilltop discovered Smith's undisclosed conflict interest in July, 1960 (R. 1244-45, 1248), and refused to a Mr. Treiger's deceptive apologia the next month (R. 1246-4 Smith ordered that the original analysis be "substantiated (Ex. 54). Such a report, without consideration or even th knowledge of the client, was unprecedented (Tr. 684, 1812-

The "substantiating" report, dated December 15, 1960, delivered to Hilltop during the course of a conference inv Cleveland counsel for both sides on February 15, 1961 (Tr. 2647; R. 1249). It purports to confirm the conclusion of original Nutwood Analysis. In fact, it is a collection of representations from beginning to end.

Exhibit 10 begins with a graphic series of overlays (ing the size of the Nutwood trade area with those of four al shopping centers in other parts of the country (Ex. 10 1-4). The text includes the statement:

> "The trade areas as illustrated have been constructe from the collected customer location data to include 85% of the total customer sample" (Ex. 10, p. 1).

In fact, each of the comparative trade areas is so compre as to include a maximum of 82.8% of the customers in one down to a minimum of 65% in another (Tr. 951-956, 959-961

: the four trade areas compared with Nutwood located in area of
milar population density, almost half of the physical extent
: the trade area is omitted (Tr. 965-966, 972-973; Ex. 147).

The comparisons are therefore not only worthless, but
ceptive and misleading.

Page 11 of the "substantiating" report, Ex. 10, asserts the
fect of Severance on "effective competition" within the Nutwood
ade area to be the difference between the $41,255,000 found in
hibit 29 at page 4 and $33,000,000, or $8,255,000. In fact,
e actual figure used by Smith was considerably higher:
1,400,000 (Ex. 176, item 38). Smith couples this misrepresent-
ion with the assertion on page 12 of the "substantiating" re-
rt that the effect of Severance on Nutwood was "limited", when
fact it was overwhelming, almost twice as much as the next
st important competing facility. (Compare the map facing p.12
Ex. 10 with Ex. 344E; Ex. 344, p. 23).

The "substantiating" report shows the extent to which Smith
s prepared to go four years before trial in covering its tracks
d preserving its interest in Severance.

Hilltop does not contend that a positive report would have
ndered certain development of a regional shopping center at
twood, but it does contend that it would have rendered it much
re likely and that that change alone would have substantially
creased the value of Nutwood. The effect of a favorable re-
ct by Smith on value, including Smith's own views on that

subject, is discussed at length in this brief at pages 58-6

It should be remembered that Exhibit 29 is not negativ its conclusions because of any critical commentary on the Nutwood site, but solely because of the "effective competit within the trade area of Nutwood (Ex. 29, cover letter, pp. and 4). In that trade area, since 1960, five substantial d count department stores and two major regional shopping cer -- Great Lakes Mall and Richmond Mall -- have been built or under construction (R. 1456). Even in the face of this tre dous increase in facilities, Smith's independent expert, Mr. Roebuck, with his conservative approach, found conside potential for Nutwood in 1970 (Tr. 1914-19, 1947-1960). O viously the trade area provided a great deal brighter futu 1960 before anyone had thought of Richmond Mall as a shopp center and at a time at which Great Lakes Mall was less de and was behind Nutwood in the stage of its development.

The fact that Smith's statements of fact as to "effec competition", and the resulting conclusions as to the lac potential of Nutwood as a regional shopping center, are in form of predictions based upon facts and conditions exist of the date of the analysis, does not render them less vu able to challenge as being fraudulent. As summarized in Jurisprudence 2d, 644 - 645, Fraud and Deceit, §35:

> "Liability in tort for fraud is imposed upon one who is employed to advise upon matters within the scope of his professional capacity, and who expresses an

opinion known by him not to be true. Knowledge of the falsity of his opinion is not requisite, however, in order to hold him liable in damages; for where his duty is to present correct statements and give sound advice, it is futile to say that he is not liable because the matter of advice would, except for his professional employment, be regarded as mere opinion."

recent Ohio Supreme Court is in accord, Pumphrey v. Quillen, 55 Ohio St. 343, 135 N.E.2d 328 (1956). It quoted Parmlee v. dolph, 28 Ohio St. 10, 21 (1875), with approval:

"Where a party, from the nature of the transaction and his relation to the parties and the facts are such that he is chargeable with a knowledge of the truth of the representations he makes, if they are false, he cannot escape liability by saying he believed them to be true. It was his duty to know whether they were true, and his belief will not excuse him from liability to the person injured thereby, unless the facts will reasonably justify a prudent man in such belief."

The negative conclusion of Smith's analysis of Nutwood was ue to misstatements of fact as to department store "total sales pacity" and "effective competition" within the Nutwood trade ea, derived in accordance with Smith's own methodology. It is us no defense for Smith now to claim (1) that the statements re mere expressions of opinion rather than statements of fact,) that the statements represented Smith's opinion at the time, (3) that its conclusions can be justified on other grounds.

D. Nutwood Had Excellent Potential as a Regional Shopping Center Site in January, 1960. [Spec. of Errors Nos. 3, 4]

The preceding section demonstrated that the conclusions of h Nutwood analysis (Ex. 29) were false based on Smith's own

methodology and on his own premises. This section will sho that the conclusions of every other expert show that Nutwoo had excellent potential as a regional shopping center in Ja 1960. It will discuss, in turn, Hilltop's experts, Dr. Rei and Mr. Ward, Smith's own criteria as set forth in his book Shopping Towns U.S.A., and Smith's expert, for the purposes the trial, Mr. Roebuck.

Reinstra and Ward dealt with Nutwood's potential in tw ways, first by accepting the accuracy of all of the defens portions of Exhibit 29, attacking Smith's figures only as effective competition and per capita spending, and, second starting afresh with the Smith methodology but doing their analysis (Ex. 330, Parts I & II). Both methods show a con erable potential for Nutwood as of January, 1960.

Next, Larry Smith himself authored a book on shopping ters, entitled Shopping Towns U.S.A. (Ex. 368) which was p lished in 1959. On page 38 of that book Larry Smith liste eleven requirements for a regional shopping center: (Ex.3

"1) The site must be located in the general area estab lished as most desirable by the economic survey.

"2) It must be owned or controlled by the developer, its acquisition must be feasible.

"3) The cost of the land must be in keeping with over all economic considerations.

"4) Existing zoning must permit usage of the site for shopping center purposes, or there must be a reas able likelihood that rezoning can be achieved.

"5) There must be enough land to allow construction of facilities that will meet the sales potential.

"6) The shape of the site must be such that advantageous planning is feasible.

"7) The land must be in one piece, free of intervening roadways, rights-of-way, easements, or major waterways, etc. that would force development in separated portions.

"8) Physical characteristics of the land must permit advantageous planning and reasonably economical construction.

"9) The surrounding road pattern and the accessibility of the land must allow the full utilization of the business potential of the projected center.

"10) The possibility of achieving visibility of the shopping center structure from major thoroughfares must be present.

"11) Surrounding land uses should be compatible with the operation, free of competitive developments; and should, if possible, offer contributing and enhancing characteristics."

Larry Smith, as an author, states that only rarely will an vestigated site completely fulfill all the requirements listed ove (Ex. 368, p. 38). Nutwood fulfilled all of them. Smith ver questioned any except No. 1, based on its own economic alysis, and No. 4, zoning potentials. Thus only these will be scussed in this brief.

Smith's studies of Severance divided suburban Cleveland o four areas. Smith found what it called "Area I" to be far h most desirable:

"The analysis . . . clearly indicates that the maximum department store opportunities within the Cleveland metropolitan area exist in suburban area I, as defined. Further growth will, in fact, accentuate the opportunities in this area." (Ex. 106, p. 25).

Smith's map of "Area I" shows that Nutwood is as close to I center as Severance (Ex. 106, following p. 6).

After inspecting the Nutwood site, Treiger's reading f memo reported it was "in a pretty strategic location" (R. 1 and Smith confirmed that the potential for suburban facilit in Nutwood's trade area was "very significant" (Ex. 29, cov letter p. 1).

Finally, on January 8, 1960, there was only one senior partment store in all of Area I, the May Company store at (Center (R. 1158).

History has proved that Smith was right in its analys Area I. Despite Smith's fraud and antitrust goals which el nated Nutwood as a regional shopping center site, two depa stores, in addition to those at Severance, have been built under construction at Great Lakes Mall and Richmond Mall; numerous discount department stores have also been built w the Nutwood trade area since Smith's negative report on Nu of January 1960 (R. 1456). Smith intended to dominate Are itself to enhance its investment in Severance to as great extent as possible.

The only other requirement for a regional shopping ce listed by Larry Smith in Shopping Towns U.S.A., the absen which from Nutwood is claimed by Smith, is number four, re to zoning.

In 1960, Nutwood was zoned for residential uses. In 196

After the owners had sold Nutwood, portions of the site were re-zoned to permit shopping center development (Ex. 328). That action is perhaps the best possible evidence that such a rezoning was reasonably likely in January, 1960.

> "The question of the existence of a reasonable probability of an imminent change in zoning is a question of fact . . . . The fact that subsequent to the taking the zoning ordinance was actually amended to permit the previously proscribed use has been held to be weighty evidence of the existence at the time of the taking of the fact that there was a reasonable probability of an imminent change." 4 Nichols on Eminent Domain 251, §12.322 [2].

The testimony of Mrs. Tyler and Mr. Fenton and the minutes of the meetings of the councils of Willoughby Hills and Wickliffe were introduced not to prove the rezoning but prove its reasonable likelihood during the time that the Winslow sisters owned Nutwood. Exhibit 201-9, especially, shows the receptivity of the Willoughby Hills village council toward the necessary rezoning, and Mrs. Tyler explained that such rezonings were not actually accomplished until a developer presented a specific plan (Tr. 305-307). Willoughby Hills was serious enough about the development in 1959 to condition its consent to the Euclid Spur on the construction of access ramps to Nutwood (Ex. 201-4; see also Ex. 334, pp. 4a-5).

Thus Larry Smith was an expert witness for Hilltop. So was Smith's outside expert, Mr. Roebuck.

Mr. Roebuck found a 1970 potential for Nutwood of some 336,000 square feet of convenience and shopping goods stores,

after having discounted that figure to reflect every competi development built, or even begun, between 1960 and 1965, su as Richmond Mall, Great Lakes Mall, and the new discount de ment stores (Tr. 1966-1970). This 286,000 square feet amou to somewhat more than half the space required for what Roeb defined on direct examination to be a "regional" shopping c (Tr. 1913). 286,000 square feet is, however, considerably space than that found in six of the ten "regional" shopping centers studied in his report, "Suburban Business Centers" 209B): Lee and Harvard; Pearl and Brookpark; Shaker Square Detroit and Warren; Eastgate; and Southgate; (Ex. 209B, p. Tr. 1955-59). Thus in 1960 Roebuck's definition of a regi shopping center exceeded the space he found in 1965 as pot for Nutwood in 1970.

Even more important is the impact of the competing ce coming into existence between 1960 and 1965 on Roebuck's 2 square foot finding (Tr. 1966-1970). If that competition ad been excluded, Roebuck's report would have been vastly mor favorable to Nutwood (Tr. 1966-1970). Such a finding woul course, have been totally consistent with Roebuck's 1960 in Exhibit 209B, as three relatively small areas (when co with the entire Nutwood trade area) in Northeastern Cuyah County, denominated E-5, NE-1 and NE-2, in Exhibit 209B, required some 600,000 square feet of additional shopping space by 1970, even on the basis of Roebuck's conservati

rojection (Ex. 209B, pp. 51-52, 54).

In June 1959 Messrs. Petti and Crume met Roebuck, Mr. Noyes, he director of the regional planning commission study (Ex. 209B, . 1), and Mr. Crandall, who was both a study staff member Ex. 209B, p. 1) and an official of the Wickcliffe planning com- ission (Ex. 202). They were encouraged by them to eek rezoning of Nutwood promptly because of the need for shop- ing center expansion in the Nutwood area (R. 1182-83). The inutes of the Wickcliffe planning commission for July 22, 1959, Ex. 202-2), report that:

> "Mr. Crandall stated that a survey of business areas around Cleveland had disclosed a need for a shopping center in this area but not as large as proposed."

t that time, Hilltop was proposing in the neighborhood of ,000,000 square feet of stores (Ex. 348B, p. 2).

Clearly Roebuck and his associates not only would have ound, but did find, sufficient potential for a regional shopping nter at Nutwood in 1960. Thus, had Roebuck directed his testi- ny as an expert at the year 1960, he would have presented a easibility report for Nutwood at least as favorable as that of instra and Ward. But even his 1965 report was radically more vorable than Smith's analysis of Nutwood and would have been ry helpful had it been available to Nutwood in 1960. Smith was ven a draft in August 1959 of Roebuck's report on shopping nter opportunities in eastern Cleveland (R. 1181); but mstadter, who made the Nutwood field report in December 1959,

(R. 1205) does not recall that Smith or Hilltop disclosed t
him (Tr. 1723).

Since 1960 two regional shopping centers have been bui
in the Nutwood Farms trade area in addition to Severance.
has obvious disadvantages when compared with Nutwood (Tr.
66, 1377-1382; R. 1456).

It is of course impossible to say exactly what would
happened had the 1960 Smith analysis truthfully indicated
substantial potential for a regional shopping center at Nu
To the extent, however, that one must reconstruct the past
necessity is occasioned by Smith's fraud in not disclosing
pending purchase of Severance and by the factual misstatem
contained in Smith's analysis (Ex. 29). Smith cannot take
vantage of its own fraud to claim the benefit of any such
of certainty. See Bigelow v. RKO Radio Pictures, 327 U.S.
66 S.C. 574,90 L. Ed. 652 (1946).

E. The Value of Nutwood in January, 1960, Was $2,500,000. [Spec. of Errors 4, 5 and 6]

The trial court rejected the opinion of Hilltop's exp
appraiser on the ground that it was "predicated somewhat
sight", and on comparable sales which the court was unabl
accept as probative of the value of Nutwood Farms (R. 147
As a result, it found Hilltop's damage claims, insofar as
related to the value of Nutwood, to be speculative (R. 14
Its opinion did not specify any particular comparable sal

e unacceptable nor what matters were "hindsight".

Any appraisal is, of course, inherently speculative to a egree. In United States v. 64.10 Acres of Land, 362 F. 2d 660, 68 (3 Cir., 1966), the court held:

> "All opinion evidence of market value is to some extent inherently speculative . . ., for it seeks to describe in the form of a realistic event what is a theoretical construction, - something which in fact did not occur."

t held, however, that a properly trained and experienced ap- raiser could properly familiarize himself retrospectively with he data necessary to form an expert opinion, and that such an pinion so qualified must be received in evidence.

Moreover, an appraiser is justified in using, as comparable ales, sales of real property taking place after the date at hich the valuation of the real property in question is directed. ited States v. 63.04 Acres of Land, 245 F. 2d 140, 144 (2d Cir. 57); 32 CJS, Evidence, §593(3), note 93.10, p. 737.

On January 8, 1960, Hilltop received Smith's analysis of twood. That analysis, as the trial court found, was worthless cause Smith fraudulently concealed from Hilltop an overwhelming nflict of interest - its imminent ownership interest in verance - in securing the assignment to make the analysis. Its alysis was also fraudulent because its conclusions were false. Infra, pp. 31-51).

At that point, and because of those frauds, the history of twood changed course. Shortly thereafter, the land was sold

for a price and under circumstances which would not have ob
tained in the absence of the analysis (see Hilltop's concur
Answering Brief, pp. 28-36). What the value of the land wo
have been on January 8, 1960, had the analysis been positiv
its conclusions, or what the history of the land would have
had it been retained by the Winslow sisters, is, of course
certain because, to paraphrase the court in United States
64.10 Acres of Land, supra, a favorable analysis of Nutwoo
from an unbiased expert "is a theoretical construction, -
thing which in fact did not occur."

But Smith may not escape liability by reason of an une
tainty which it created. As the court stated in Locke v. n
States, 283 F.2d 521, 524 (Ct. Cl., 1960):

> "The defendant further takes the position that . . .
> the amount [of damages] is too speculative . . . But
> the constant tendency of the courts is to find some
> way in which damages can be awarded where a wrong ha
> been done. Bigelow et al v. RKO Radio Pictures, 327
> U.S. 251, 265, 66 S. Ct. 574, 90 L.Ed. 652. Difficu
> of ascertainment is not to be confused with right of
> recovery. Nor does it exonerate the defendant that s
> misconduct, which has made necessary the inquiry int
> the question of harm, renders that inquiry difficult
> Eastman Kodak Co. v. Southern Photo Materials Co., 2
> U.S. 359, 379, 47 S. Ct. 400, 71 L.Ed. 684. The defd
> ant . . . should not be permitted to reap advantage fro
> his own wrong by insisting on proof which by reason of
> his breach is unobtainable. Crichfield v. Julia, 2 ir
> 147 F. 65. . . . [T]he plaintiff must . . . establish
> that he has sustained some injury . . . Story Parch
> Co. v. Paterson Parchment Paper Co., 282 U.S. 555,
> 248, 75 L.Ed. 544.
>
> "If a reasonable probability of damage can be clear
> established, uncertainty as to the amount will not

"'Any other rule would enable the wrongdoer to profit . . . at the expense of his victim. It would be an inducement to make wrongdoing so effective . . . as to preclude any recovery by rendering the measure of damages uncertain. Failure to apply [this rule] would mean that the more grievous the wrong done, the less likelihood there would be of a recovery.

"'The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created.' Bigelow v. RKO Radio Pictures, supra, 327 U.S. at page 264, 66 S.Ct. at page 580."

22 Am. Jur. 2d, Damages, §25, summarizes the law:

". . . all that can be required is that the evidence - with such certainty as the nature of the particular case may permit - lay a foundation which will enable the trier of facts to make a fair and reasonable estimate of the amount of damage. The plaintiff will not be denied a substantial recovery if he has produced the best evidence available and it is sufficient to afford a reasonable basis for estimating his loss."

ashington law is in accord. Wenzler & Ward, etc. Co. v. Sellen, 3 Wn.2d 96, 98, 330 P.2d 1068 (1958).

Because Nutwood was not sold as a regional shopping center te, and because an analysis which should have been positive s negative, it is impossible to reconstruct precisely what uld have happened to Nutwood in the absence of Smith's frauds. Nevertheless, there is almost complete unanimity as to the value a potential regional shopping center site.

Hilltop's expert, Mr. Fenton, testified as to the development and progression of value of a regional shopping center site follows:

"In my opinion, these sales indicate a pattern that is [illegible] transition from rural

land to a finished and operating shopping center. As the land falls into a population pattern that indicates that it is . . . to become useful for other than residential or farming purposes, the market begins to buy it . . . for its future growth. As the idea of a shopping center comes more clearly into focus, with the growth of the neighborhood . . . this value continues to increase in the . . . market. . . . [W]hen . . . the market . . . believes a shopping center is feasible in the near future and will be successful, it begins to reach a value, as shown typically in . . . [t]he February 10, 1959 sale of one quarter of the stock of . . . Severance for $750,000]. The value . . . continues to increase as the certainty of . . . a shopping center increases so that when leases are . . . signed and its construction seems well assured, the value is pretty well illustrated by . . . [the sale of Severance to Smith on February 10, 1960, for $4,000,000 plus].

"The final stage in the growth of a shopping center value takes place when the center is constructed and the shoppers are in the stores, at which time it may go to $1.00 a square foot [$43,560 per acre] and substantially higher." [Tr. 1374-75].

Mr. Fenton's final conclusion as to the value of Nutw January 8, 1960 (Ex. 334-A, p. 9), was approximately $2,5 with the shopping center land evaluated at $17,500 per ac the balance at $5,000 per acre. His views are remarkably i lar to those of Larry Smith. On January 28, 1959, Smith w a memorandum on Severance which reads, in part, as follow

"We have, within the last six months, sold two such undeveloped properties at prices between $1,250,000 and $1,750,000. In neither case do we believe the quality equal to yours. There is, however, an increasing reluctance as the price reaches a total amount of $1,750,000 for land alone, or a price in excess of $30,000 per acre for shopping center land.

"The apartment land is not worth as much as the commercially zoned, and the net fringe commercial land after allowance for landscaping and interchange

parking is about 45 acres. * * *

"We would not be interested in trying to set up a deal at the maximum figure outlined above, [$3,200,000] but we would at say $2,750,000. * * *

"This, of course, reflects our opinion that it is sometimes possible to find a buyer willing to pay more than our opinion of the actual value of a property, and our feeling that everything considered a buyer would have to acquire the property at approximately $2,750,000 to justify the profit which would be comparable to other opportunities currently available - although all prospective buyers might not be acquainted with those competitive opportunities." (R. 1151).

evertheless, after the department store leases were signed,

mith paid $4,000,000 (R. 1225-26).

Similarly, on June 11, 1957, Treiger wrote:

". . . if Halle Company could get a competing site within this area, it would be very dangerous to allow them to go ahead from both Halle's standpoint as well as from the development standpoint. Everybody . . . [was] united in the opinion that acquiring property like this . . . would be impossible. Larry . . . thought [it] would be reasonable for a desperate store to pay as much as $2,000,000 for property, just to get a location in order to maintain a strategic position in this very important market. Everybody [commented] that even at that price, [it] would be difficult to acquire enough property and to get it zoned." (R. 1120)

hus Smith felt that a regional shopping center in the Severance

rea competitive with Severance would be worth some $2,000,000

n 1957, even though not zoned for shopping center purposes.

An illustration of the growth and value of property for

hopping center purposes, depending on the closeness of the

ctual shopping development or its likelihood, finds a perfect

xample in the various Severance sales discussed in the admitted

facts and in Mr. Fenton's testimony. The first sale of Severance was that of three quarters of the stock of the co oration owning the property for $750,000 indicating a $1,00 valuation for the entire property (R. 1080, 1373). This sa took place in July, 1955, after the property had initially rezoned for commercial purposes, but before the 1958 termir of a lawsuit challenging the zoning and before the property rezoned to allow supermarkets (R. 1061). It also preceded first favorable Smith report on Severance (Ex. 105, August

The sale of the remaining one quarter of the stock of company on February 10, 1959, would indicate a site value $3,000,000. (R. 1152, 1373-74). At that time, the rezoni problems had been completely solved but Severance had no t who had signed leases. The earliest was still almost a ye the future (R. 1207). The final sale, to Smith, on Februa 1960, after the execution of the department store leases b fore construction, was at $4,000,000 plus a number of othe tangible and valuable rights, for only 131 acres of the Se property (R. 1225-26, 1374).

On a per acre basis, the 1955 sale was at just over per acre, the 1959 sale at just under $20,000 per acre, a 1960 sale at just over $30,000 per acre.

Each of these sales is consistent with Smith's views value of regional shopping center sites (Ex. 368, p. 40).

What effect does a favorable report from a company

mith have on the value of a site proposed for a regional shop-
ing center? Perhaps this question can best be answered by ask-
ng another. Would Severance have become a regional shopping
enter if it had been promoted by a real estate broker with no
xperience in the field and with a negative report on its po-
ential from Smith on its hands in 1955? Even with Smith's
ealous promotional efforts and highly favorable reports, it
equired over four years of hard work to secure the department
tore leases but that work paid off handsomely. (R. 1063, 1207).
ithout those reports and that effort, there is an excellent
hance that Severance today would be vacant, or composed of
ingle family residences or apartment houses.

Moreover, Smith did not hold itself out to Hilltop Realty
s simply a shopping center analyst. Its original proposal of
eptember 30, 1959 stated:

> "Depending on the outcome of our analysis, we would be in a position to provide further analysis in connection with specific consideration to the financial aspects of the development potentials, including budgeting the financial requirements, and to the time requirements, and working with you and your principals in connection with the development program as a whole. This latter work could then be used as a basis for planning from the standpoint of legal mechanics and tax programming, as well as land use planning. * * *
>
> "We have also had experience in working on ground use plans, merchandising the plans of the property to be sold, working on financing of the investment properties, and consideration of assessed valuations and tax loads." (Ex. 32, pp. 2-3).

It was Smith's breach of contract and fraud in taking the

Hilltop job and in providing an erroneous analysis, Exhibi
which deprived Hilltop of the opportunity to continue with
a program with the same reasonable probability of success
Nutwood that had existed at Severance a year or so earlier
That opportunity itself, even though success was not certa
placed Nutwood at a stage attended by a far greater value
was reflected by the sale to Ridge Hills Development Compa

It is also clear that Ridge Hills did not include any
ditions based upon changes in zoning or the construction o
full interchange at Bishop Road in connection with its off
purchase of April 29, 1960 (R. 1238; Tr. 1664). Both cond
were, of course, necessary if the property was to be devel
for commercial purposes, but neither was necessary if the
erty was to be used for residential purposes (Exs. 201, 20
would be hard to imagine more conclusive evidence that Ric
Hills did not purchase Nutwood for shopping center purpos

The opportunity to continue to promote Nutwood with f
able analysis from a national shopping center consultant u
have resulted in a value for the Nutwood property in the n
between that of the first and second Severance sales and
range found by Hilltop's expert, Mr. Fenton. The foreclo
of that opportunity by Smith directly enhanced the value
Severance itself by making it more certain that it would
into existence as a regional shopping center and by maki
more profitable after completion.

The key question raised by Hilltop's cross appeal is the highest and best use of Nutwood Farms on the date of the submission of Smith's analysis, and not the value of the land if its highest and best use was for shopping center purposes because, as this section demonstrates, there is no substantial disagreement on that point.

We have already shown that Mr. Fenton's appraisal is in substantial agreement with the view of Smith personnel on the value of shopping center land. There is no testimony controverting either Larry Smith or Mr. Fenton on that question because Smith's expert, Edwin Smith, appraised the Nutwood Farms only for residential purposes, because of a misconception of Ohio law. At page 8 of his appraisal, Exhibit 340, Edwin Smith states:

> "Highest and best use of a given site as of a given date of valuation is limited by law and appraisal practice in the State of Ohio, to such development as is prescribed by existing zoning.
>
> "Under such circumstances, the highest and best use for the subject site [Nutwood] is for residential usage, in conformity with the actual zoning regulations pertaining on January 8th, 1960.
>
> "The appraiser has been asked by counsel to determine fair market value (a) based on zoning as of January 8th, 1960, and (b) on the assumption that future possible changes in zoning might be taken into account. Upon the latter assumption, the highest and best use in the opinion of your appraiser would still be the existing residential zoning, inasmuch as possible changes in the zoning of the subject property would be speculative."

The trial court found this premise, and thus Edwin Smith's conclusions, to be legally erroneous (R. 1470). The court apparent

relied on In re Appropriation of Easement for Highway Purp Over Property of Darrah, 118 Ohio App. 315, 194 N.E.2d 582 (1963), the most recent and authoritative Ohio precedent o subject.

Edwin Smith assumed that the highest and best use of on January 8, 1960 was for residential purposes; Harry Fe found that its highest and best use was for a regional sho center. His findings were confirmed by Hilltop's shopping ter experts, by Smith's expert, Mr. Roebuck, for all pract purposes, and would have been found by Smith himself in hi analysis of Nutwood had that analysis been accomplished co sistently with Smith's own usual methodology.

It is therefore submitted the fair value of Nutwood January 8, 1960, was $2,500,000; or $17,500 for the shopp center land and $5,000 per acre for the balance (Ex. 334A

CONCLUSION

It is respectfully submitted

1. The antitrust counts should be remanded for jury on the merits, and Hilltop should be allowed reasonable a fees on its Cross-Appeal.

2. The fraud and breach of contract counts should remanded for reconsideration on the present record, and t ceive further evidence if either party elects, or the Co directs, as to compensatory damages arising from sale by h

alue as a valuable regional shopping center site, because of heir reliance on Smith's fraudulent report and fraudulent concealment of its impending purchase of a competitive site at everance.

3. Costs and disbursements should be allowed to Hilltop n its Cross Appeal.

DATED at Seattle, Washington, December 9, 1966.

Albert E. Stephan

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of
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CERTIFICATE OF COUNSEL

I CERTIFY that, in connection with the preparation of this ief, I have examined Rules 18, 19 and 39, of the United States urt of Appeals for the Ninth Circuit, and that, in my opinion, e foregoing brief is in full compliance with those rules.

By _____
Albert E. Stephan of
Attorneys for Cross-Appellants,
HILLTOP REALTY, INC., et al.

PROOF OF SERVICE

I CERTIFY that, pursuant to Rule 18(2)(d), on December 9, 66, I caused three copies each of the foregoing document to be rved on Helsell, Paul, Fetterman, Todd & Hokanson, attention Richard S. White, Esq., and Gerald G. Day, Esq., 1610 Washing- n Building, Seattle, Washington 98101, counsel for Larry P. ith, et al., and on Bogle, Gates, Dobrin, Wakefield & Long, tention of Robert W. Graham, Esq., and Ronald E. McKinstry, Esq., th Floor, Norton Building, Seattle, Washington 98104, counsel r The Austin Company, by having my secretary mail the same to em at said addresses in duly addressed envelopes with First ass postage prepaid, and that said addresses are their last own addresses, and that said attorneys are all of counsel of cord for Cross-Appellees.

By _____
Albert E. Stephan

APPENDIX

APPENDIX A
MEMORANDUM DECISION OF MAY 13, 1963. [R. 21-2]
Upholding Antitrust Counts

[R.21] Defendants' principal attack against the complaint filed by plaintiff is found in their motion to dismiss the claims made in paragraphs XIV and XV of the complaint which invoke the Sherman Antitrust Act, 15 U.S.C.A. Sections 1 and 2.

Assuming the truth of the matters alleged in the complaint, which I must do at this stage of the proceeding, I am of the opinion that plaintiff states a cause of action under the most recent decisions of the Supreme Court of the United States. I am frank to say, however, that I am both shocked and surprised at the expanded concept of the Sherman Act as found in those decisions. If this were a matter of first impression, I think I might very well hold for defendants but I am not permitted such freedom of action. I may not agree with such decisions--but follow them I must. Accordingly, defendants' motion to dismiss the Sherman Act claims will be denied at this time. Defendants' motion to dismiss plaintiff's claim under the Ohio Antitrust Act will also be denied. The denial of the foregoing motions is made without prejudice to their being again raised by defendants after the entry of a pretrial order.

Further, defendants' motions to dismiss certain of [R.22] the parties, their motion for a separate trial on the issue of Federal jurisdiction and their motion for an increased non-

Finally, the parties should be advised that the Cour
invoked Rules 20A and 20B of the local civil rules of this
and directs that pretrial procedures in this case shall be
all respects governed by the provisions thereof.

The parties should commence discovery as soon as pos
and have all such discovery completed as soon as possible.
matter is placed on the Assignment Calendar for July 8, 19
which time the Court will set a date for the holding of a
trial conference.

Plaintiff shall prepare an order in accordance with
decision for presentation to the Court on Monday, May 20,
at 9:30 a.m.

DATED this 13th day of May, 1963.

(s) W. T. BEEKS
United States District Judge

APPENDIX B

Excerpt from AMENDED MEMORANDUM DECISION OF MARCH 29, 1965
Granting Partial Summary Judgment and
Dismissal of Antitrust Counts at [R. 829-30]

* *

THE ANTITRUST COUNTS

829] In view of the complexity of the issues in this case and
n order to permit the court to pass intelligently upon the
ending motions, the court on December 14, 1964, ordered the
laintiff to file a detailed concise statement of its factual
ontentions. This the plaintiff has done and the court's rul-
ngs herein are based on those contentions rather than on the
llegations of the amended complaint. Accepting as true these
ontentions and all reasonable inferences to be drawn therefrom,
: appears that plaintiff's basic complaint is the submission to
: by Smith of a false market analysis report which caused
illtop and the Winslow sisters to sell the Nutwood property at
price substantially below that which they could have obtained
they had sold it for shopping center development. Smith's
leged objective was the supression of potential competition
its Severance shopping center. Austin is alleged to have
nspired with Smith in the general objective of restraining
opping center competition, but no contention is made that
stin conspired in any way specifically with respect to Nutwood.

The court is of the opinion that these facts do not state
cause of action under the antitrust laws. Assuming, arguendo,
at there was in fact an antitrust violation by the defendants,

including Austin, plaintiff shows no causal connection bet
the restraint of shopping center competition and its claim
injury. By plaintiff's own allegations its injury was cau
by the fraudulent breach of a fiduciary duty. The fraud i
did not constitute the antitrust violation. To recover,
tiff must establish two things: (1) A violation of the An
trust Act and (2) damages to the plaintiff proximately res
from the acts of the defendants which constitute a violatio
the Act. Glenn Coal Co. [R. 830] v. Dickinson Fuel Co., 7
885, 887 (4th Cir. 1934).

In Schatte v. I.A.T.S.E., 182 F.2d 158 (9th Cir. 19
cert. denied, 340 U.S. 827, a carpenter's union sued a cor
union and a number of major motion picture production stu
alleging a conspiracy of the defendants to replace the ca
ters with members of the defendant union. Four causes of
were alleged: Breach of contract by the studios; tortiou
ference with contractual relations by the competing union
rivation of civil rights; and violation of the antitrust
in that the major studios compelled smaller studios to hi
efficient members of the competing union to replace carpe
with the intention of thereby increasing the smaller stu
costs of production beyond their financial capacity, thu
inating them from competition. One of the grounds on wh
court based its decision was that "no damage to business
property which stems from a conspiracy in violation of a

aws is alleged. The loss of their rights of employment is not result of any lessening of commercial competition among the tudios." 182 F.2d at 167 (Emphasis added.)

In Peterson v. Borden Co., 50 F.2d 644 (7th Cir. 1931), orden and certain majority stockholders of a competing milk ompany conspired to fraudulently induce plaintiff minority tockholders to sell to the majority stockholders at $535 per hare when the actual value was $1,000 per share, for the pur- ose of enabling the majority stockholders to sell the corpora- ion to Borden, thereby lessening competition in the interstate ilk industry. The court affirmed a dismissal, holding that--

R. 831]

> ". . . the right of action given to persons injured through the resultant tendency to substantial lessening of competition or creation of monopoly would include such injury only as such tendency to lessen competition or to create monopoly engendered. We do not understand how a stockholder of an absorbed corporation who parted with his stock for less than its actual value can attribute his loss to the substantial lessening of competition or the creation of monopoly through acquirement of the corporate stock by a competitor. The competition destroyed or the monopoly created could not injure him in his relation as a stockholder of the acquired corporation, since he had parted with his stock." 50 F.2d at 646. (Emphases added.)

he case is in principle indistinguishable from the one at bar nd the following excerpt therefrom will illustrate the lack of ausal connection in Hilltop:

> "(W)e are met at the outset with the utter want of causal relation between the alleged injury to plaintiffs and the alleged statutory transgression by any of the defendants. The statute was not designed

> to give to (persons) who have been defrauded in the sale of their (property) treble damages for their injuries, nor indeed any new or additional remedy for such injury. If they have been thus defrauded, the law aside from the antitrust statutes affords ample remedy." 50 F.2d at 645, 646.

Hilltop and the sisters have an ample remedy indeed, since Ohio law they may recover punitive damages which could con ably total more than any double or treble antitrust recove The motions for partial summary judgment and for dismissal accordingly granted as to both antitrust counts, the parti ing in agreement that the law under the Ohio act is the sa federal law. In view of this disposition of the case the finds it unnecessary to decide the issues raised relative the statute of limitations, the effect in interstate comm the "target area" cases cited by the parties, or the comp of The Austin Company in the alleged conspiracy. [R. 832

* * *

DATED this 29th day of March, 1965.

(s) W. T. BEEKS
United States District Jud